IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

SPENCER HARDNEY,

Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

RECORD OF PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

SPENCER HARDNEY,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 15-1430
	)	
ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the March 6, 2015, Board of Veterans' Appeals (Board) decision, which denied Appellant's claim of entitlement to an initial evaluation in excess of twenty percent for type I diabetes mellitus (diabetes), for the period prior to March 8, 2009.

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant, Spencer Hardney, seeks the Court's review of March 6, 2015, Board decision, which denied his claim of entitlement to referral for an extraschedular evaluation, in excess of twenty percent, for diabetes, for the period prior to March 8, 2009. Record Before the Agency (R.) at 13 (1-14). The

Court may not disturb that portion of the Board's decision that awarded an increased, forty percent, evaluation for diabetes, from March 8, 2009, as that finding is favorable to Appellant. *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority."); R. at 3, 12, 14 (2-14). Appellant does not challenge those aspects of the Board's decision that denied entitlement to a schedular evaluation, in excess of twenty percent, for diabetes, for the period prior to March 8, 2009, and a schedular evaluation, in excess of forty percent, for the periods from March 8, 2009, and October 29, 2011. Appellant's Brief (App. Br.) at 1-14; *see* R. at 4-12 (1-14). Appellant, also, does not assert that extraschedular referral was warranted, for diabetes, for the periods from March 8, 2009, and October 29, 2011. He fails to provide any analysis, argument or discussion of Board error with regard to the schedular evaluations assigned. Therefore, he abandoned his appeal of those issues. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

B. Statement of Facts

Appellant served on active duty from May 1986 to June 2006. R. at 289. Prior to his separation from service, in February 2006, Appellant sought entitlement to service connection for, *inter alia*, diabetes, type I. R. at 1049 (1044-54). He was afforded a Department of Veterans Affairs (VA) general

medical examination, in May 2006, which noted that he had a five year history of insulin dependent diabetes. R. at 999.

A Rating Decision was issued, in February 2007, which granted Appellant's claim of entitlement to service connection for diabetes, with a twenty percent evaluation, effective the day following service; July 1, 2006. R. at 1198 (1196-1209). Appellant, in July 2007, filed his notice of disagreement (NOD). R. at 918. In support of his claim, Appellant submitted a June 2007 treatment note from his private physician, Dr. M.G. R. at 919. She noted that Appellant received treatment for glucose control, which included a two thousand calorie diet, insulin therapy, and daily exercise. *Id*. Appellant showed improvement on that regimen. *Id*. A Statement of the Case (SOC) was issued, in November 2007, which continued the assigned twenty percent evaluation. R. at 872-99. That same month, a Supplemental SOC (SSOC) was issued, which also continued the assigned twenty percent evaluation. R. at 865-68. The following month, Appellant appealed to the Board. R. at 862-63.

A December 2007 treatment note, from Dr. M.G., noted that Appellant administered insulin at least four times a day for glucose control. R. at 869. He was required to maintain a diabetic diet. *Id.* Appellant was required to exercise five times a week for thirty minutes. *Id*. Dr. M.G. noted that Appellant experienced several hypoglycemic episodes in her office, at home and at work, during which, he would exhibit confusion, personality change, blurred vision, motor weakness, sweating, and tachycardia. *Id*. He was required to keep

glucose with him at all times to treat his hypoglycemia. *Id*. Ongoing treatment included weekly to monthly visits to review his glucose readings and laboratory findings and systemic medications. *Id*.

In June 2008, Appellant submitted lay statements from persons who indicated that they witnessed Appellant's hypoglycemic episodes on more than one occasion. R. at 854-56. A December 2009 VA fee-basis examination noted that Appellant did not have any history of diabetic ketoacidosis that required hospitalization. R. at 812 (812-14). Appellant reported that he experienced hypoglycemic reactions that required hospital treatment an average of once a year and that he required three visits to a diabetic care provider each month. *Id*.

Another SSOC was issued, in December 2009, which continued the previously assigned evaluation. R. at 807-10. The Board, in September 2011, remanded Appellant's claim for the purpose of obtaining additional treatment records and a new examination to determine the severity of his condition. R. at 741-42 (736-43). Appellant was afforded a new examination, in October 2011. R. at 706-10.

The October 2011 examiner noted that Appellant had a history of regulation of activities due to multiple hypoglycemic episodes and restriction from moderate to heavy exertional activities. R. at 707 (706-10). Appellant had visits to his diabetic care provider for episodes of ketoacidosis or hypoglycemic reactions less than two times per month. *Id*. He had not been hospitalized during the prior year due to ketoacidosis or hypoglycemic reactions. *Id*.

Appellant had progressive weight loss due to his diabetes. *Id*. Complications due to diabetes included erectile dysfunction and eye conditions other than retinopathy. R. at 708 (706-10). Appellant's diabetes also aggravated his hypertension. *Id*. The examiner noted that Appellant's diabetes impacted his ability to work and although he worked full time, his coworkers were aware of his condition and trained to act if a hypoglycemic event occurred. R. at 710 (706-10).

An April 2012 Rating Decision was issued that increased Appellant's diabetes evaluation to forty percent disabling, effective October 29, 2011, the date of the October 2011 examination. R. at 1087-96; *see* R. at 706 (706-10). That same month, another SSOC was issued, which continued the denial of entitlement to an evaluation in excess of forty percent for diabetes. R. at 1097-1109. The Board remanded Appellant's claim in a January 2013 decision. R. at 483-89. The Board ordered that Appellant "should be requested to provide statements from his spouse and co-workers identifying the approximate dates and circumstances involving any care for a hypoglycemic reaction provided since July 2007[.]" R. at 488 (483-89). The Board, further, ordered that efforts should be taken to obtain any outstanding treatment records from Dr. M.G. *Id*.

A request for outstanding records was sent to Dr. M.G., R. at 473] and additional records were subsequently received. *See*, *e.g.*, R. at 590-93, 602-05, 606-10, 620-61. A notification letter was also sent to Appellant that requested statements from his wife and co-workers, in accordance with the January 2013

Board decision. R. at 670-72. An April 2013 SSOC was issued, which denied an evaluation in excess of twenty percent, prior to October 29, 2011, and a forty percent thereafter. R. at 480 (474-82).

On March 6, 2015, the Board issued a decision that awarded an increased, forty percent, evaluation for diabetes, from March 8, 2009. R. at 1-14. In the same decision, the Board denied an evaluation in excess of twenty percent, prior to March 8, 2009. *Id*. Appellant filed his Notice of Appeal with the Court of Appeals for Veterans Claims, on April 16, 2015.

III. SUMMARY OF ARGUMENT

The Court should affirm the March 6, 2015, Board decision denying entitlement to an increased evaluation for Appellant's diabetes, because there is a plausible basis in the record for the Board's findings and the decision is supported by an adequate statement of reasons or bases.

IV. ARGUMENT

The Court should affirm the March 6, 2015, Board denial of entitlement to an evaluation in excess of twenty percent, for Appellant's diabetes, prior to March 8, 2009, because the finding is supported by the evidence of record and not clearly erroneous.

A. Legal Standard

The Board's assignment of a disability rating is a question of fact that the Court reviews under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4); *see Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). Under this standard, the Court will not overturn a finding of fact "if there is a

'plausible' basis in the record for the factual determinations of the [Board." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1991).

VA utilizes a rating schedule as a guide in the evaluation of disabilities resulting from all types of diseases and injuries encountered as a result of, or incident to, military service. The percentage ratings represent, as far as can practicably be determined, the average impairment in earning capacity in civilian occupations, resulting from such diseases and injuries and their residual conditions. 38 C.F.R. § 4.1.

The Board is required to consider all evidence of record and to consider, and discuss in its decision, all "potentially applicable" provisions of law and regulation. *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); *see* 38 U.S.C. § 7104(a). The Board is also required to include in its decision a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; that statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert,* 1 Vet.App. at 56-57.

B. Analysis

Appellant's diabetes disability was evaluated as twenty percent disabling for the period prior to March 8, 2009, pursuant to 38 C.F.R. § 4.119, Diagnostic Code (DC) 7913. *Id*.; *see* R. at 11 (1-14). Diagnostic Code 7913 provides a

twenty percent evaluation for diabetes requiring insulin and a restricted diet, or, oral hypoglycemic agent and restricted diet. 38 C.F.R. § 4.119, DC 7913. A forty percent evaluation requires insulin, restricted diet, and regulation of activities. *Id*. A sixty percent evaluation "requir[es] insulin, restricted diet, and regulation of activities with episodes of ketoacidosis or hypoglycemic reactions requiring one or two hospitalizations per year or twice a month visits to a diabetic care provider, plus complications that would not be compensable if separately evaluated[.]" *Id*. A one hundred percent evaluation "[r]equir[es] more than one daily injection of insulin, restricted diet, and regulation of activities (avoidance of strenuous occupational and recreational activities) with episodes of ketoacidosis or hypoglycemic reactions requiring at least three hospitalizations per year or weekly visits to a diabetic care provider, plus either progressive loss of weight and strength or complications that would be compensable if separately evaluated[.]" *Id*.

Appellant does not challenge that aspect of the Board decision that denied entitlement to a schedular evaluation in excess of twenty percent for diabetes, prior to March 8, 2009. *See* App. Br. at 1-14; *see also* R. at 4-12 (1-14). Appellant fails to provide any analysis, argument or discussion of Board error with regard to the schedular evaluation issue. *See* App. Br. at 1-14. In fact, Appellant concedes that he "does not meet the scheduler rating criteria for a rating in excess of 20 percent prior to March 2009[.]" App. Br. at 8. Therefore, any potential challenge to that issue should be found abandoned. App. Br. at 1-

14; *see Pederson*, *supra*; *see also Cromer v. Nicholson*, 19 Vet.App. 215, 217 (2005) (issues not raised on appeal are considered abandoned); *Ford v. Gober*, 10 Vet.App. 531, 535-36 (1997) (claims not addressed by the appellant in pleadings before the Court were found to be abandoned).

To the extent that Appellant asserts that referral for extraschedular consideration was warranted, *see* App. Br. at 4-12, this Court should find his assertion unavailing. Specifically, Appellant asserts that his symptoms fail to meet the schedular criteria for an evaluation in excess of twenty percent, for the period prior to March 8, 2009, yet, he should be entitled to an extraschedular evaluation because his condition exhibits some symptoms contemplated by higher schedular evaluations. *See* App. Br. at 6-7, 9-10.

Pursuant to 38 C.F.R. § 3.321(b), in an exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation and Pension Service is authorized to approve an extraschedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. *Id*. In *Thun v. Peake*, 22 Vet.App. 111 (2008), *aff'd*, 572 F.3d 1366 (Fed. Cir. 2009), the Court set forth the three-prong standard for consideration of an extraschedular rating, stating "the threshold factor for extraschedular consideration is a finding that the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate[.]" *Thun*, 22 Vet.App. at 115.

Here, the Board determined that "[t]he schedule[a]r criteria adequately describe[d] [Appellant's] symptoms for his diabetes mellitus." R. at 13 (1-14). The Board noted that Appellant's symptoms included "multiple insulin injections daily, regulation of diet, regulation of activities, and hypoglycemic reactions that d[id] not require hospitalization." *Id*.

Although Appellant asserts that it is unclear how the Board determined that the Rating Schedule adequately contemplated his hypoglycemic reactions that did not require hospitalization, App. Br. at 6, the Rating Schedule, specifically, discussed hypoglycemic reactions, but requires that they result in hospitalization. 38 C.F.R. § 4.119, DC 7913 (requiring episodes of ketoacidosis or hypoglycemic reactions requiring one or two hospitalizations per year or twice a month visits to a diabetic care provider). The Board, and Appellant, acknowledged the symptom and noted that there were no resultant hospitalizations, during the relevant time period. R. at 13 (1-14); *see* App. Br. at 6-7. There was nothing "exceptional" about Appellant's disability; rather, it is clear that Appellant's symptoms, and the severity of those symptoms, fell within the available rating criteria. *See* App. Br. at 6-7, 9-10; *see also Thun*, 22 Vet.App. at 115. Appellant, merely, failed meet the rating criteria for an increased schedular evaluation. *See* App. Br. at 9 (Appellant's acknowledgment that his symptoms were insufficient to establish an increased schedular evaluation).

With a negative finding as to the first prong of the *Thun* analysis and no further evidence to support a finding that the symptoms and severity of his

disability were exceptional or unusual, the Board was not required to discuss the remaining aspects of the analysis. *See Thun*, 22 Vet.App. at 115. Accordingly, there was no need for the Board to consider governing norms. *See Thun*, 22 Vet. App. at 119. Therefore, the Board's finding that referral for consideration of an extraschedular disability rating was not warranted, based upon Appellant's failure to make even a threshold showing was not clearly erroneous and any further consideration was not prejudicial. *See Overton v. Nicholson*, 20 Vet.App. 427, 433 (2006) (The Court must take due account of the rule of prejudicial error.); 38 U.S.C. § 7261(b)(2); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (holding that an appellant bears the burden of persuasion on appeals to this Court).

V. CONCLUSION

In view of the foregoing argument, Appellee, Secretary of Veterans Affairs, respectfully requests that this Court affirm the Board's March 6, 2015, decision.

Respectfully submitted,

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